# Supreme Court of the United States

**OCTOBER TERM, 1962**

## No. 903

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**UNITED STATES, PETITIONER**

*vs.*

**KENNETH LEROY BEHRENS**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**INDEX**

[fol. 1]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CRIMINAL DOCKET

TH-60-CR-26

Title of Case

THE UNITED STATES

*vs*

KENNETH LEROY BEHRENS

Attorneys

*For U. S.:*

United States Attorney

*For Defendant:*

Vio: Assault with intent to murder, and Assault of Govt. Employee Title 18 U.S.C. Sec. 113(a) & 111—2 Counts Symbol

WILLIAM E. STECKLER, JUDGE

* * * *

[fol. 2]

* * * *

| DATE | DOCKET ENTRIES |
|---|---|
| 8/12/60 | Indictment filed. Bail $10,000. Praecipe for warrant filed. |

* * * *

| DATE | DOCKET ENTRIES |
|---|---|
| [fol. 3] | |
| | • • • • |
| 12/19/60 | Trial commenced. Jury impaneled and sworn. Out of the presence of jury, deft orally moves the Court for a mental examination. After hearing from counsel of both parties, court overrules said motion. Opening statement of counsel for govt made, deft. waiving making an open statement. Evidence on behalf of the govt is heard and concluded and govt rests. Evidence on behalf of the deft is heard and concluded, and deft. rests. Court adj. until 10:00 tomorrow morning. (SE) |
| 12/20/60 | Trial resumed. Out of presence of jury, the Court inquires of deft if he wishes to take the witness stand in his own behalf, and deft answers the Court in the affirmative. Closing arguments of counsel are heard, after which the court instructs the jury, Deputy marshal, in whose charge the jury will be, is now sworn. Jury is instructed to commence its deliberations. Jury returns verdict in open court finding deft guilty on Ct. I and not guilty on Ct. II of the indictment. Jury discharged. (SE) |
| | Deft. sentenced to 20 years in prison and for a study to be furnished by the court within 3 months under Title 18 USC 4208 (c) whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 USC 4208(b). |
| | • • • • |
| 1/20/61 | Upon request of James V. Bennett, Dir. of Prisons, Dept. of Justice, dated 1/17/61, to extend period of observation for defendant an additional 30 days is GRANTED. Period of observation on defendant extended an additional 30 days. (SE) |

| DATE | DOCKET ENTRIES |
|---|---|
| 1/17/61 | Defendant files motion for transmittal of record in forma pauperis. |
| 2/ 1/61 | Court denies motion for transmittal of record in forma pauperis. |
| 2/10/61 | Request of Mr. James V. Bennett, Dir. of Bureau of Prisons, dated 2/8/61, for an extension of period of observation for deft., GRANTED Period of observation extended an additional 60 days. (SE) |
| 6/13/61 | Court enters order modifying judgment. Deft. Behrens sentence of imprisonment heretofore imposed be reduced to 5 years, and deft shall become eligible for parole under the provisions of Title 18 U.S.C. 4208 (a) 2. (SE) |

[fol. 4]

* * * * *

| | |
|---|---|
| 4/11/62 | Defendant files motion to vacate sentence. |
| 4/11/62 | Motion to vacate sentence denied. |
| 4/23/62 | Affidavit of poverty filed and request to appeal in forma pauperis |
| 4/25/62 | Leave to appeal in forma pauperis granted. Notice of Appeal under Rule 71(b) filed. |

[fol. 5]

WILLIAM E. STECKLER, Judge

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH-60-Cr-26
18 U.S.C., 113(a)

[File Endorsement Omitted]

UNITED STATES OF AMERICA

*v.*

KENNETH LEROY BEHRENS

INDICTMENT—filed August 12, 1960

COUNT I

The Grand Jury charges:

That on or about August 7, 1960 Kenneth Leroy Behrens, at and in Vigo County, State of Indiana, in the Terre Haute Division of the Southern District of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing said Donald Byron Skaggs with a metal knife.

COUNT II 18 U.S.C., 111

The Grand Jury further charges:

That on or about August 7, 1960 Kenneth Leroy Behrens at and in Vigo County, State of Indiana, in the Terre Haute Division of the Southern District of Indiana did unlawfully and wilfully, and with the use of a dangerous weapon, to-wit: a metal knife, forcibly as-

sault Floyd Dunnagan who was then and there engaged in the performance of his official duties as an employee of the United States Prison, Terre Haute, Indiana.

A True Bill

/s/ R. E. Jones
Foreman

/s/ Don A. Dabbert
United States Attorney

[fols. 6-8] * * *

[fol. 9]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH-60-CR-26

UNITED STATES OF AMERICA

*vs.*

KENNETH LEROY BEHRENS

ENTRY OF ARRAIGNMENT AND APPOINTMENT OF COUNSEL
September 7, 1960

Honorable William E. Steckler, Judge

Comes now the attorney for the Government and the defendant appears in person and being without counsel the Court advises the defendant that he has the right to have an attorney, and if he is financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appointed Ralph A. LaFuze, a member of the bar of this Court to represent him. After conferring with counsel, the Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant executes and files Consent to Transfer of Case within District, which reads as follows, to-wit: (H.I.) The defendant having been given a copy of the Indictment and the same having been read to him in open Court by the attorney for the Government, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the Indictment, for plea, says that he is Not Guilty as charged.

[fols. 10-15] • • •

[fol. 16]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

*v.*

KENNETH LEROY BEHRENS

VERDICT—December 20, 1960

We, the Jury, find the defendant Guilty on Count I and Not Guilty on Count II of the indictment.

/s/ E. E. Christeria
(Foreman)

(Date) December 20, 1960

[fol. 17] • • •

[fol. 17a]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-Cr-28

UNITED STATES OF AMERICA

*v.*

KENNETH LEROY BEHRENS

**TRANSCRIPT OF THE DISPOSITION OF DEFENDANT BEHRENS, BEFORE HON. WILLIAM E. STECKLER ON THE 20TH DAY OF DECEMBER, 1960**

APPEARANCES:

FOR THE GOVERNMENT—James W. Bradford and John C. Vandivier, Jr., Assistant U. S. Attorneys.

FOR THE DEFENDANT—Ralph Lafuze, of Lafuze, Ging & Graber, Indianapolis, Indiana.

[fol. 17b] (At 2:05 P.M., after the Jury had returned its verdict of "Guilty" on one Count and been excused, the Court, along with Mr. Bradford and Mr. Lafuze, with the Defendant, remained in session as the following transpired:)

THE COURT: I will hear from counsel with regard to this stage of the proceedings; that is, whether or not there is good reason for the Court to refer the matter to the Probation Office for a pre-sentence investigation, or whether the Court should withhold the imposition of final sentence, impose the maximum today, and order a study to be made by the Bureau of Prisons as to the recommendations that they might have to make. Or whether the Court should go ahead and impose final judgment today

in view of the known prior record of the Defendant and in view of the Court's first-hand knowledge of the evidence of the case. The evidence that the Jury heard. It's all fresh in the mind of the Court.

I'll hear from the Government counsel. What do you think, Mr. Bradford?

MR. BRADFORD: Your Honor, the Government at this time would see no benefit from a pre-sentence investi- [fol. 17c] gation. And it is the desire of the Government to dispose of the case today if possible, leaving it in the Court's sound discretion as to whether the Court would care to impose a sentence of the Court's own choosing, or whether the Court would prefer to impose a sentence under 18 United States Code 4208, that being the maximum with the Bureau of Prisons being permitted to make a study. The Government would not oppose either method of disposition by the Court.

THE COURT: All right. Mr. Lafuze, what is your attitude with regard to the matter of making a disposition of the case on the various—under the various methods that I have stated?

MR. LAFUZE: I have consulted with the Defendant, and we feel that we would like to have the case disposed of today.

THE COURT: Today?

MR. LAFUZE: Yes.

THE COURT: Does he have a desire to have it disposed of today?

THE DEFENDANT: Yes, your Honor.

THE COURT: You mean you want this Court to en- [fol. 17d] ter its final judgment today, is that right?

THE DEFENDANT: (Nods head.)

THE COURT: Now you're not interested in this Court having a further pre-sentence investigation made—

THE DEFENDANT: (Shakes head)

THE COURT: —nor having a special study made by the Bureau of Prisons?

THE DEFENDANT: (Shakes head.)

THE COURT: Are you acquainted with that procedure?

THE DEFENDANT: (Shakes head.)

THE COURT: You are not. Well, it works both ways. Sometimes it works for a defendant, and sometimes it works against him.

But I'm inclined to follow the 2208 (sic) procedure in this case. I say that for this reason: This presents an internal problem to the prison system of what to do with these fellows who are bent upon violating the rules of decency, and you might say just ordinary civility, in the prison community. They don't even act civilized at times in these penal institutions.

[fol. 17e] I don't know, Mr. Behrens, whether or not you heard about Mr. Stalls down there or not, did you?

THE DEFENDANT: (Nods head.)

THE COURT: Were you in the dining room when he was involved in that affair?

THE DEFENDANT: (Shakes head.)

THE COURT: But you heard that he, too, was involved in an affair in which a knife had been taken from the dining room and sharpened into a very effective dangerous instrument.

Hadn't you heard that?

THE DEFENDANT: (Nods head.)

THE COURT: Could that by chance have caused you to come up with the same idea?

THE DEFENDANT: (Shakes head.)

THE COURT: How well-known is it down there—Or how well is it generally known that you can take these knives out of the dining room and sharpen them up and make a deadly weapon out of them? Does everybody know that?

THE DEFENDANT: It's general knowledge.

[fol. 17f] THE COURT: Very generally known, is it?

THE DEFENDANT: Anybody can carry a knife.

THE COURT: Well, this Court has somewhat of a mixed feeling about these prison cases. I can see two sides to this problem. I can see the civil court's side, our side. I can see the side of the penal authorities. Here on the one hand they're required to use complete restraint with regard to their own conduct as to these obstreperous individuals who don't want to follow the rules of the institution.

On the other hand, I presume I am somewhat laboring in the dim past, where prison officials had the right—or they didn't have the right; they took, within their own means, the so-called "rubber hose," or the "whipping post." And they handled their own internal problems themselves. And no Court heard anything about them.

Now about five years ago this Court commenced receiving out of the Terre Haute Penitentiary these cases. What went on before that, I don't know. But we didn't [fol. 17g] have very many, if any. But above five years ago we started getting these cases out of the Penitentiary.

Now this past year we had one defendant who was charged with first-degree murder. And it wasn't over six months before that when the Court gave a defendant the maximum, as provided by law, for assault with a deadly weapon. So as to establish a deterrence down in that institution.

And what happened? Our friend Knight comes along and murders one of his fellow inmates, I dare say within less than six months after that. And Knight was there when the other individual received the ten year sentence for assault and battery.

I don't think we're going to deter these boys down in the penal institution from cutting each other to pieces. I think the most important thing that I recognize out of these experiences involving the prisoners is that double precautions must be taken to prevent access to deadly weapons.

There's just too much of it. These fellows are slicing each other to pieces down there, and apparently the penal [fol. 17h] authorities are almost helpless.

It's a little alarming to a judge to hear about narcotics in an institution. Enough could be gleaned out of this record in this case to indicate that some of these boys had access to something that they shouldn't have had.

Now am I right in that?

THE DEFENDANT: (Shakes head.)

THE COURT: You're not talking, are you?

THE DEFENDANT: (Nods head.)

THE COURT: You don't know?

THE DEFENDANT: (Shakes head.)

THE COURT: But you don't know anything about the narcotics?

THE DEFENDANT: (Shakes head.)

THE COURT: Well, the way I feel about it—The only reason that this dissertation came forth is I think we've got here somewhat of an internal problem with which the penal authorities are confronted. And I see no reason why they should not make a study in these cases and come up with a recommendation as to what they [fol. 17i] think is an appropriate disposition of the case. And I don't say that I will follow their recommendations to a letter But there'll have to be a rather strong showing made as to why the Court would not follow what I consider to be a reasonable recommendation on the part of the Bureau of Prisons, under these 4208 proceedings.

So you see where it puts you, Mr. Behrens: You're right back in the control of the prison authorities. You better make up your mind to behave yourself. And try to salvage what you can out of your life.

And I might say, from my own observation, I believe that you are a young man who hasn't tried to see the better side of life. I don't think you've tried at all. I think you've seen the dim, dark, shady side of life. As long as you stay on that side you see only the immorality that exists all about you. I don't think there's very much hope for you in that event.

I know a whole lot more about you than what I've already told you. I think you'd better start straightening [fol. 17j] out your ways. You're going to destroy yourself from within.

This letter here is what I had reference to. This letter from Dr. Rink tells a lot of story. Tells an awful lot.

Do we have that—

(The Court confers outside the record briefly with his Court Crier.)

THE COURT: No, I have it.

Well, since it is the desire of the Defendant to have this case disposed of today, I will dispose of it today. But it will be under the flexible provisions of 4208—Section 4208.

All right, Mr. Behrens, would you step up here? I may want to hear from you further.

(The Defendant, accompanied by his counsel, come forward.)

THE COURT: Under the law the Court must give you an opportunity to say anything you have to say as to why the Court should not impose an executed judgment, or an "executed sentence,"—

THE DEFENDANT: No.

THE COURT: Don't you have anything to say?

[fol. 17k] THE DEFENDANT: (Shakes head.)

THE COURT: Don't you have any remorse, any feeling at all with—

THE DEFENDANT: My remarks ain't fit in your ears.

THE COURT: None whatsoever?

THE DEFENDANT: (Shakes head.)

THE COURT: Have you given up entirely?

THE DEFENDANT: It's just simpler to get it over with.

THE COURT: I certainly would want to know about your history. I want to know more about you before I enter a final judgement in your case. I think we ought to try to find out, Mr. Behrens, where you got off. You're off the track somewhere. 'Way off. I don't believe that every man is as bad on the inside as you may want to make yourself believe you are. It's too much against nature for a man really to be as you seem to purport to the doctor, Dr. Rink, that you are. I think you're fooling yourself now. I don't think you really believe in what you state you stand for.

[fol. 17l] What is the penalty?

He has nothing to say.

I'll hear from you, too, Mr. Lafuze. What do you have to say, Mr. Lafuze, as to why the Court should not impose a final judgement today, or impose an executed sentence?

MR. LAFUZE: Well, it's—I really haven't had much experience in this aspect of life. Haven't had much experience in criminal law, what goes on in the peniten-

tiary. But from what Behrens tells me, he's—he's very mistrustful. He thinks the world is against him. And I—I don't know what—how we could help him. I've tried to talk with him. I've had a tough—I've had a difficult time talking to him. I don't know whether anybody could really talk to him. He just doesn't trust anybody. Until he does, I don't see how we can help him.

If he would—perhaps if he would trust a psychiatrist he might be helped. I imagine there are—the Government has psychiatrists who are competent. Might be able to do something for him.

But he's—

THE COURT: One thing sure, I agree with you. He [fol. 17m] needs help. He needs something to straighten his thinking around.

Well, let's see now, they found the Defendant Not Guilty on—

MR. BRADFORD: Count II, which is—

THE COURT: What is the penalty on Count I?

MR. BRADFORD: Up to 20 years, your Honor.

THE COURT: Up to 20 years. What was the—That was 113—

MR. BRADFORD: 113(a), your Honor.

THE COURT: (Examines documents) All right. Do you have anything to state further, Mr. Bradford?

MR. BRADFORD: No, your Honor. The evidence all went in yesterday. I'm certain the Court has a true and accurate picture of what took place. There are no matters in aggravation which the Government would offer at this time, sir.

We have nothing further to state.

THE COURT: All right. Except for the fact that [fol. 17n] I—I'm convinced that maximum sentences in these cases do not deter these fellow prisoners, I would be inclined to impose a very substantial sentence in this case today. Because I don't want to try murder cases. Now that's the reason I imposed the maximum sentence once before, hoping that we could avoid trying first-degree murder cases. And it was less than six months after we imposed that maximum penalty as a deterrent that we were confronted with a murder that had been committed in the very institution.

MR. BRADFORD: I think, your Honor, that maximum sentencing has some deterrent value. However, it is not the whole answer.

But one thing that concerns the Government—now we have an offense, stabbing in an institution. What occurs to me, after presenting several of these cases to Grand Juries, having tried this case and the Stalls case, what concerns me would be Mr. Stalls or Mr. Behrens on the street. That's the thing that concerns me. It's not primarily the deterrent of the other inmate population.

THE COURT: I see what you mean. I think you're [fol. 17o] right.

MR. LAFUZE: Your Honor, if I could just say something: In the case I think it was brought out that the prison authorities are really rather helpless to deal with these prisoners. I mean, what can they do? You say "Take away their dessert and throw them in solitary." It's much different than it used to be, apparently. And I remember my experience in the Military Service, in the U. S. Navy, was somewhat the same. The power of the Captain to punish had just been reduced until he has to resort to courts; and discipline, I think, has suffered.

And perhaps it's the same true in prisons. (sic) Lack of power to discipline at local levels have brought the cases up to the Federal Court.

THE COURT: Well, there is no way of judging with any certainty what degree of deterrence is accomplished by imposing maximum penalties with regard to specified crimes. I mean, there's just no way of telling.

Well, it is the Judgement of this Court, based upon the [fol. 17p] Jury's finding of Guilty with regard to Count I of the indictment, that the Defendant is guilty as charged therein; and that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of twenty years, and for a study as described in Title 18, United States Code, Section 4208(c), the results of such study to be furnished this Court within ninety days, or three months —Three months. Make it "three months" instead of the "ninety days." It's more uniform. Within three months. Whereupon the sentence of imprisonment herein imposed

shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b).

Now in short, Mr. Behrens, what this means is that after there has been a staff evaluation made of your case —and I presume that you're pretty sick about hearing— or sick of hearing about "staffs" and "staff evaluations" and "psychiatric evaluations," but they have a purpose and they have a place. And we believe in them. Now there will be such an evaluation made in your case.

And I think after about three months, when everybody [fol. 17q] has had an opportunity to reflect upon your case quite thoroughly, that we should be able to come up with a sane and civil disposition of your case.

So, I will rely I presume largely upon what the Bureau of Prisons recommends.

I go back to my original thought: This is a case that lies largely within their own realm. They ought to be able to have a lot of say-so as to what should be done with this case in the final analysis. Because he's offended the prison system.

All right. We'll stand adjourned.

(Whereupon, at 2:30 o'clock P.M., December 20, 1960, these proceedings were concluded.)

[fol. 17r]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 18]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

*vs.*

KENNETH LEROY BEHRENS

JUDGMENT AND COMMITMENT—December 20, 1960

On this 20th day of December, 1960 came the attorney for the Government and the defendant appeared in person and by Ralph C. LaFuse, his court-appointed attorney. No presentence investigation having been directed by the Court,

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of, on or about August 7, 1960, at and in Vigo County, State of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife, in violation of Title 18 U.S.C. Section 113(a), as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his au-

thorized representative for imprisonment for a period of Twenty (20) years, and for a study as described in Title 18 U.S.C. 4208(c), the results of such study to be furnished the Court within Three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U.S.C. 4208(b).

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer, and that the copy serve as the commitment of the defendant.

/s/ William E. Steckler
United States District Judge

[fol. 19]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

No. TH-60-CR-26

[File Endorsement Omitted]

KENNETH L. BEHRENS, PETITIONER

*vs.*

UNITED STATES OF AMERICA, RESPONDENTS

MOTION FOR TRANSMITTAL OF RECORD IN FORMA PAUPERIS—filed January 17, 1961

TO: The Honorable William E. Steckler, Judge.

May it please the court that now comes Kenneth L. Behrens, Petitioner in propria persona in this entitled course of action; and asking for cause why an order granting the preparation and transmittal of record in forma pauperis in petitioner's behalf, should not be granted.

Jurisdiction

For jurisdiction in this matter, petitioner cites the provision's of section 1915; title 28; U.S.C. Re., that your petitioner is a citizen of the United States by virtue of birth with out sufficient fund's to prepay the cost of this action, or it's preparation thereto; that he submits this motion in good faith in the expectations of further proceedings; and that his said motion is not submitted herein as a form of exactions litigation.

For jurisdiction for the possible allowance of the order to forthwith issue (as discretionary); the petitioner cites the recent decision of the United States Supreme Court in the case of Griffin vs. People of the State of Illinois, 76 S. Ct. 858; (prisoner's court transcript in forma [fol. 20] pauperis.) ???ided April 23, 1956.

Defacto Evidence

Petitioner refers to this honorable court to all proceedings had prior to and including the 20th day of December, 1960; where upon sentence was imposed.

Conclusion

Petitioner respectfully submits that in support of the foregoing jurisdiction and authority, that the relief as prayed be granted.

Payer

The premises fully considered, your petitioner pray's that an order be granted, and entered under the hand and seal of this court; directing the clerk of said court to prepare the following document's as part of the proceeding's had in criminal case number *26*, and that the same be transmitted to your petitioner without cost thereof.

(1) TRANSCRIPT OF TRIAL, No. TH-60-CR-26.
(2) ALL WARRANTS ISSUED.

Respectfully Submitted

/s/ Kenneth L. Behrens
KENNETH L. BEHRENS,
Petitioner

Personally appeared before me, the above named man Kenneth L. Behrens known to me to be the same person who executed the forgoing instrument, and acknowledged to me that he had executed the same as his free act and deed.

Witness my signature and official designation

/s/ C. H. Shade
C. H. SHADE—Attesting Officer
Case Worker, U.S. Penitentiary
Terre Haute, Indiana

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)

Dated at Terre Haute, Indiana, this 12 day of Jan. 1961.

[fols. 21-22] * * *

[fol. 23]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

*vs.*

KENNETH LEROY BEHRENS

ORDER DENYING MOTION FOR TRANSMITTAL OF RECORD IN FORMA PAUPERIS—February 1, 1961

This cause came before the court upon the "Motion for Transmittal of Record in Forma Pauperis" filed by the defendant herein. Defendant, under this cause number, designates himself in the motion as "Petitioner," and designates the United States of America as "Respondents." The motion was filed January 17, 1961.

After reciting that he is a citizen of the United States and without sufficient funds with which to pre-pay the costs of this action or for its preparation for further proceedings, defendant asks that the Clerk of the Court be ordered to prepare and transmit to the petitioner without cost, (1) "Transcript of Trial, No. TH 60-CR-26, and (2) "All Warrants Issued."

A judgment of commitment was entered in this cause on December 20, 1960, the defendant having been found guilty by jury of the offense of having willfully and with malice aforethought assaulted Donald Byron Skaggs, with intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife on lands reserved and acquired for use of the United States as a site for a penal institution, in violation of Title 18 U.S.C. § 113(a). The defendant, on said 20th day of December, 1960, was [fol. 24] committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 20 years and for a study described in Title 18 U.S.C. § 4208(c), the results of such study to be furnished the court within three months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U.S.C. § 4208(b).

Thus, according to Rule 37 (a) (2) Federal Rules of Criminal Procedure, the time for appeal from the entry of the judgment of December 20, 1960, expired on December 30, 1960. Defendant's "Motion for Transmittal of Record in Forma Pauperis" which was filed on January 17, 1961, was filed after the time for appeal had expired, and accordingly, there is no judicial proceedings pending before this court in this cause of action with respect to which this court may order payment of the costs of a transcript under 28 U.S.C. § 1915, and the Court Reporter Act, 28 U.S.C. § 753.

Lest it should be asserted that the time for appeal runs from the date of the modification of the original judgment in this cause, attention is called to the provisions of Title 18 U.S.C. § 4208(a) which speaks initially of "judgment of conviction," and § 4208(b) which refers to "determining the sentence to be imposed" and provides that "the term of the sentence shall run from the date of the original commitment under this section." It is thus indicated that this section is concerned with punishment and [fol. 25] not with that part of the judgment which pronounces conviction; or, stated in other words, that part of the court's judgment of December 20, 1960 providing for the study and the report and making the sentence of imprisonment of 20 years subject to modification upon the receipt of the report of such study, does not stay the running of the time within which appeal must be taken, i.e., ten (10) days as provided by Rule 37, Federal Rules of Criminal Procedure. If any appeal was to have been taken, it had to be taken within ten (10) days of the judgment of conviction. An analagous case is one wherein the imposition of sentence is suspended and the defendant is placed on probation. The appeal nevertheless runs from the date of such judgment. *Korematsu* v. *United States*, 319 U.S. 432.

Since the court concludes there is now no proceedings pending before the court, the motion for the furnishing of the transcript and the warrants without costs as prayed by the defendant is hereby DENIED.

/s/ William E. Steckler
United States District Judge

[fol. 26-27] * * *

[fol. 28]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

*vs.*

KENNETH LEROY BEHRENS

ORDER MODIFYING JUDGMENT—June 13, 1961

The defendant having been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of, on or about August 7, 1960, at and in Vigo County, State of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife, in violation of Title 18 U.S.C. Section 113(a) as charged in Count I of the Indictment, and having on December 20, 1960 been committed to the custody of the Attorney General pursuant to Title 18 U.S.C. 4208(b), for imprisonment for a period of Twenty (20) years, and for a study as described in 18 U.S.C. 4208(c), and the Court having now received and considered the report of such study,

IT IS ORDERED AND ADJUDGED that the period of imprisonment heretofore imposed be reduced to Five (5) years, and that the defendant shall become eligible for parole at such time as the Board of Parole may determine under the provisions of Title 18 U.S.C. 4208(a)(2).

DATED: June 13, 1961.

/s/ William E. Steckler
United States District Judge

[fols. 29-33] * * *

[fol. 34]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

Case No. TH 60-CR-26

KENNETH L. BEHRENS, PETITIONER

*vs.*

UNITED STATES OF AMERICA

[File Endorsement Omitted]

MOTION TO VACATE SENTENCE UNDER SECTION 2255; TITLE 28; U.S.C. IN FORMA PAUPERIS UNDER SECTION 1915; TITLE 28; U.S.C.—filed April 11, 1962

Comes now the petitioner, Kenneth L. Behrens, who respectfully submits to this Court the following facts and allegations why his sentence should be vacated.

*Statements of Facts*

1 On September 7, 1960, the petitioner appeared before the United States District Court in Indianapolis, Indiana for arraignment; charged with violation of Sections 113 (A), III, Title 18, U.S.C. The petitioner entered a plea of not guilty on each of the charges.

(2) On September 7, 1960, the court appointed a Mr. Ralph O. Lafuze, attorney at law, to represent the petitioner.

(3) The Honorable William E. Steckler presided at the petitioner's arraignment and trial.

(4) On December 19, 1960, the petitioner was tried in the United States District Court in Indianapolis, Indiana; charged with violation of Sections 113 (A), III, Title 18; U.S.C. A prefatory request for a mental examination of the petitioner was denied by the court.

(5). At the pronouncement of sentence, Judge William E. Steckler, cross-examined the petitioner on matters not pertinent to the charges for which the petitioner was to be sentenced.

[fol. 35] Allegations

* * * *

(6) That two agents of the Federal Bureau of Investigation, serving as witnesses for the prosecution, under sworn oath, did make the following mendacious statements:

(A) Federal Bureau of Investigation Agent Manning falsely testified that he and Agent Gettle, interviewed the petitioner on the evening of August 7, 1960 in a room of which he, Agent Manning, and the petitioner were the sole occupants in the room at the Federal Penitentiary at Terre Haute, Indiana. Warden T. W. Markley, Associate Warden H. J. Davis, and other officials of the Federal Bureau of Prisons were also present during the course of the aforesaid interview.

(B) Agent Manning falsely testified that the petitioner was advised of his constitutional right to legal counsel.

(C) Agent Manning falsely testified that the petitioner was not exposed to intimidation. Agent Manning promised to intercede in the petitioner's behalf to persuade Warden Markley to have him transferred from the strip-cell in which he had been quartered since August 7, 1960, to persuade Dr. Rinck, chief medical officer of the aforesaid institution, to insure the petitioner necessary medication—which had been discontinued since August 7, 1960, on the condition that he sign an incriminating statement.

(7) That officers of the Federal Bureau of Prisons, serving as witnesses for the prosecution, under sworn oath, did make the following contradictory statements:

(A) Officer Floyd Dunnagan testified that Officer Norrick attempted to physically apprehend the petitioner as he descended from the right hand stair case in "L" unit. [fol. 36] Officer Dunnagan's testimony was saliently contradicted by Officer Norrick who testified that he held a

butt can in his hands and that he did not attempt to physically apprehend the petitioner.

(B) Officer Kenneth Norrick testified that the petitioner ran down the right hand stair case of "L" unit directly and without interruption into the corridor.

Officer Norrick's testimony was saliently contradicted by Officer Conway who testified that the petitioner was standing in the doorway of "L" unit after which he ran into the corridor.

(C) Officer David Boyce testified that upon his request the petitioner placidly surrendered a knife to him, and the following conversation ensued (in a normal tone of voice):

Officer Boyce: "Did you get him?"

Petitioner: "I hope I killed him."

Officer Lawrence Conway testified that the corridor was sufficiently quiet to permit him to be witness to the foregoing conversation.

Officer Conway's testimony was saliently contradicted by Officer Norrick who testified that the scene of the petitioner's apprehension was tumultuous with all of the officers in the vicinity shouting to the petitioner.

(D) Officer Floyd Dunnagan testified that the petitioner made the following statements to Donald B. Skaggs who was in a prostrate position: "Get up or I will stab you again".

Officer Dunnagan's testimony was saliently contradicted by Federal Prisoner Carl Dunn who, as a witness for the prosecution testified that the petitioner made the following statement to Donald B. Skaggs: "Get up so I can stab you some more."

(E) Officer Floyd Dunnagan testified that Skaggs sprinted up the left stair case in "L" unit pursued by the petitioner, and that Skaggs had blood on the back of his shirt and not on the front of his clothing.

Officer Dunnagan's testimony was saliently contradicted by Federal Prisoner Carl Dunn who, as a witness for the prosecution, testified that Skaggs had blood on the front of his shirt. The victim Donald B. Skaggs testified that he felt a blow on his back and while running up the stairs he felt his back bleeding.

(8) That the petitioner has incontestable proof that one of the witnesses, furnished by the prosecution, perjured himself at the aforesaid trial.

Wherefore, the petitioner respectfully prays that a vacation of sentence be granted; and that an order be entered thereupon that the petitioner be discharged from custody of the respondent.

/s/ Kenneth L. Behrens
KENNETH L. BEHRENS, Petitioner

Sworn to and subscribed before me this 15th day of February, 1962.

/s/ W. L. Tappana

W. L. Tappana, Administrative Assistant, Medical Center for Federal Prisoners, Springfield, Missouri.

Administrative Assistant (Record Clerk) Authorized by the Act of July 7, 1955, to Administer Oaths (18 USC 4004)

[fol. 37]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

KENNETH L. BEHRENS, PETITIONER
*v.*
UNITED STATES OF AMERICA, RESPONDENT

ORDER DENYING MOTION TO VACATE SENTENCE—
April 11, 1962

This cause came before the court upon the motion of petitioner to vacate sentence under Section 2255, Title 28, United States Code. After considering said motion, and being duly advised in the premises, the motion to vacate sentence is hereby DENIED.

In support of the above, the court relies primarily upon the following:

(1) The petitioner could not be harmed by what occurred at the time of entry of judgment and sentencing.

(2) Even if it be assumed that false testimony was given at petitioner's trial, which it is not, this is not grounds for vacation of judgment and sentence under Section 2255 where it does not appear that the testimony was known to be false by the prosecuting authorities. *United States* v. *Jakalski*, 237 F.2d 503 (7th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957). Nor does an unsupported charge of perjury entitle petitioner to a hearing. [fol. 38] *United States* v. *Spadafora*, 200 F.2d 140 (7th Cir. 1952).

(3) The alleged contradictory statements appear to be no more than trivial conflicts, which do not constitute perjury, and which merely present questions for the jury to resolve. *United States* v. *Spadafora*, *supra*, 200 F.2d at 142.

(4) As to the failure to grant a mental examination, as requested, prior to trial, this involves an error of law, if anything, and should have been raised by timely appeal. *United States* v. *Spadafora*, 207 F. 2d 291 (7th Cir. 1953).

/s/ William E. Steckler
United States District Judge

[fols. 39-44] • • •

[fol. 45]

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13756 September Term, 1962
September Session, 1962

KENNETH LEROY BEHRENS, PETITIONER-APPELLANT

*v.*

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

OPINION—December 26, 1962

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Kenneth Leroy Behrens, the petitioner-appellant, was found guilty by a jury of assault with intent to murder in violation of 18 U.S.C.A. § 113(a). Judgment was entered on the verdict and the petitioner was committed to the custody of the Attorney General pursuant to 18 U.S.C.A. § 4208(b).[1] The Bureau of Prisons was granted a 30 day and a 60 day extension of the three month period for study of the petitioner

[1] The judgment and commitment order provided, inter alia, that:

"It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years, and for a study as described in Title 18 U. S. C. 4208(c), the results of such study to be furnished the Court within Three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U. S. C. 4208(b)".

in order to complete a psychiatric examination. On June 13, 1961, after having received and considered the Bureau's report on its study of the petitioner, the District Court entered an order modifying the previous judgment and providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years".
[fol. 46] Thereafter, the petitioner filed a motion to vacate sentence. Jurisdiction was predicated on 28 U.S.C.A. § 2255. The District Court denied the motion and petitioner appealed.

Petitioner's main contentions on appeal are that the District Court's denial of his oral motion for a mental examination constituted a denial of due process and that the absence of petitioner and his counsel at the time the court modified petitioner's commitment makes the reduced sentence subject to collateral attack for want of due process in its imposition.

We find no error in the District Court's rejection of the denial of the petitioner's motion for a mental examination as affording a basis for relief under § 2255. It was an oral motion made at the commencement of the trial and after the jury had been sworn, but out of its presence. 18 U.S.C.A. § 4244 contemplates that a motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. The oral motion failed to do this, and although the trial court did entertain the motion and consider it on its merits, no showing was made which required that a mental examination be ordered. Moreover, petitioner's trial court counsel stated that petitioner was, in his opinion, fully able to understand the charges against him and assist in his defense. The only showing adduced to support the motion was defense counsel's statement that petitioner's medical record revealed that he had once cut himself and "[A]ny cutting of one's self is fairly serious". Under the circumstances here presented it was not error or a deprival of due process to deny the motion for a mental examination. Cf. *Krupnick* v. *United States*, 8 Cir., 264 F. 2d 213, 216.

Although 18 U.S.C.A. § 4208(b) authorizes a commitment of a convicted defendant for a study to serve as an

aid in determining the sentence to be imposed there is no final determination of the actual sentence until affirmative action is taken after the reports and recommendations resulting from the study have been received. In this respect § 4208(b) provides:

> "If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed [fol. 47] to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section".

And the report to be made pursuant to §4208(c) relates to the following data:

> "[T]he prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent".

If probation is not granted, either an affirmance of the maximum sentence of imprisonment prescribed by law for the offense (which maximum sentence the statute deems to have been imposed) or a reduction of that sentence, is required. That the term of the sentence as then fixed by affirmance or reduction is to run from the date of the original commitment serves merely to assure the con-

victed defendant of credit for the period devoted to the study—the statute thus fixes the starting point of the sentence whenever it is utilized in determining punishment, but the duration of the sentence must await final determinative action of the court in affirming the maximum term or reducing it. Until such action occurs no definite and final sentence has been imposed.

In *Parr* v. *United States*, 351 U. S. 513, 518, it was observed that the rule that in general, a judgment is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined, applies in criminal as well as civil cases.

[fol. 48] In our opinion that rule is applicable here and fundamental requirements of due process made it essential that the petitioner be present at the time of such imposition of sentence, and that his right to have his counsel present be honored. Rule 43, Federal Rules of Criminal Procedure (18 U.S.C.A.) required the presence of the defendant. Rule 44 recognizes his right to be represented by his counsel "at every stage of the proceeding" in harmony with the guarantee of the Sixth Amendment. A sentencing, even to probation, is admittedly invalid in the defendant's absence. *Pollard* v. *United States*, 352 U. S. 354, 360. The Solicitor General in a memorandum submitted in *Grabina* v. *United States*, 369 U. S. 426 conceded that absence of a defendant at the time of sentencing was "fundamental error" and under such circumstances "there are basic infirmities in the sentence".[2] Cf. *Ellis* v. *Ellisor*, 5 Cir., 239 F. 2d 175; *Wilfong* v. *Johnston*, 9 Cir., 156 F. 2d 507.

We have considered *United States* v. *DeBlasis*, 177 F. Supp. 484 (D. Md. 1959); *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md. 1962) and *United States* v. *Johnson*, 207 F. Supp. 115 (E. D. N. Y. 1962) in each of which it is held that the presence of the defendant at the time of a reduction in the maximum term of imprisonment pursuant to § 4208(b) is not required. We have

[2] See excerpt from Solicitor General's memorandum submitted in *Grabina* quoted in *United States* v. *DeBlasis*, 206 F. Supp. 38, 39-40.

also considered the construction placed on § 4208(b) in *Corey* v. *United States*, 1 Cir., 307 F. 2d 839 and *United States* v. *Behrens*, 190 F. Supp. 799 (S. D., Ind. 1961).[3] But we are of the view that these cases rely too heavily on terminology employed in the statute which, in the context used, is at best ambiguous.

To regard the maximum term of imprisonment "deemed" to have been imposed by § 4208(b) as an actual sentencing of the defendant, even where, as here, the maximum term is expressly written into the judgment order, is, in our considered judgment, directly contrary to the express intent and purpose of the section. The declared object and purpose of § 4208(b) is to enable the court to obtain such detailed information as may aid it in determining the actual sentence to be imposed. It is for this purpose that § 4208(b) authorizes and provides [fol. 49] for a limited postponement of definitive action until the study is made and the reports and recommendations received. The action to be taken under § 4208(b) is unlike a reduction of sentence made under Rule 35, Federal Rules of Criminal Procedure. Rule 35 admits of a discretionary reduction of a sentence already definitively imposed and Rule 43 properly dispenses with the defendant's presence for such purpose. But, under § 4208(b) until the "affirmance" of the maximum term of imprisonment or its "reduction" no definitive sentence has been imposed—there is no sentence.

And, it is at the time when the actual definitive sentence which is to be served is imposed that the presence of the defendant and his right to advice of counsel is meaningful. It is only then that in many cases an intelligent decision as to appeal can be made. Probation or a light sentence may well be a determinative influence on whether an appeal is to be taken. Moreover, the right of allocution is more crucial when the court is about to pronounce the actual sentence the defendant is to serve

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[3] We have also noted the several different views as to whether an offender must be returned to the court for sentencing following a 4208(b) commitment existing among those who have had occasion to express themselves on the subject. Seminar & Institute on Disparity of Sentences, 30 F. R. D. 401, 439.

—more so than when the court merely permits the statute to automatically prescribe the maximum imprisonment until the court can more intelligently appraise pertinent factors in the light of more detailed information and make the actual determination as to what the sentence shall be. We do not read *Hill* v. *United States*, 368 U.S. 424, or *Machebroda* v. *United States*, 368 U.S. 487, as placing beyond the purview of relief under 28 U.S.C.A. § 2255 a situation where absence of the defendant shows the defendant was affirmatively denied an opportunity to speak at the time his actual sentence was imposed. In *Hill*, where defendant and his counsel were present at the time sentence was imposed, the Court was careful to point out (p. 429):

> "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed.
>
> * * * *
>
> Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider."

[fol. 50] We therefore conclude that the District Court erred in denying petitioner's motion to vacate the sentence. But, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, we reverse and remand with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18 U. S. Code, consistent with the views herein expressed.

Mr. Aribert L. Young of the Indianapolis bar has ably served the petitioner in this appeal as counsel by appointment of this Court. We express our appreciation of those services.

REVERSED AND REMANDED.

[fol. 51] KNOCH, *Circuit Judge* (dissenting). I agree with the majority of this Court in affirming the underlying judgment of conviction in this case. I am, however, unable to agree that the District Court erred in denying petitioner's motion to vacate the sentence.

It may well be the better practice in some instances to produce the defendant in court when the sentence previously imposed is to be modified in accordance with the provisions of Title 18, U.S.C., § 4208(b). For example, where the Court is going to grant probation, personal instruction may be required properly to impress the defendant with the serious nature of probation and the grave consequences of violating its rules and provisions.

However, this question must be a matter for the Trial Judge's sound discretion in the light of the circumstances of a particular case. It is not an essential for due process.

In the matter before us, the defendant and his counsel were afforded the usual right of allocution at the time that the original sentence was imposed. That was defendant's opportunity to present all matters in mitigation. The fact that trial tactics might be better served by presenting, or repeating, these matters at a later time should not alter procedures. Neither should the fact that the Trial Judge may later modify the sentence originally imposed, after consideration of information to be acquired from another source. The procedure under Title 18, U.S.C., §4208(b) is analogous to that under Rule 35, Federal Rules of Criminal Procedure. The sentence cannot be increased. It can only be left unmodified or reduced.

In the matter before us, the disposition of the case, made while the defendant was present in open court, left open only one question. That question was to be resolved through medical examination, over a period of time, by competent authorities who were to report their findings to the Court. There was no need to consult the defendant; there was no need for the defendant to be present in court. This was solely a matter for the Judge's consideration of the expert medical advice he was to receive.

Unnecessary transfer of prisoners multiplies opportunities for escape and has upon occasion created serious dangers not only to those charged with the care of the prisoner but to the public at large. Transfer away from the institution of confinement should be employed only when important rights of the prisoner demand it.
[fol. 52] With the flood of correspondence which reaches judges from the penal institutions, at every conceivable provocation, it would appear that a defendant might communicate by mail if there were any particular matters to which he wished to invite the Trial Judge's attention in connection with the report which he knew was being prepared.

Unlike the majority, I find the *Corey* case persuasive. I am convinced that extension of the time for appeal is not contemplated by the statute.

* * * *

[fol. 53]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

No. 13756

KENNETH LEROY BEHRENS, PETITIONER-APPELLANT

*vs.*

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

JUDGMENT—December 26, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is the conclusion of this Court that the District Court erred in denying petitioner's motion to vacate the sentence, but, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, it is ordered and adjudged by this Court that the order of the said District Court denying petitioner's motion to vacate the sentence be, and the same is hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18

U.S. Code, consistent with the views expressed in the opinion of this Court filed this day.

[fol. 54]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 903, October Term, 1962

UNITED STATES, PETITIONER

*vs.*

KENNETH LEROY BEHRENS

ORDER ALLOWING CERTIORARI.—April 29, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 569.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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